85-725 (1)

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

WOODROW MAUGET
Petitioner

vs.

KAISER ENGINEERS, INC. et. al.
Respondents

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTION PRESENTED

Should the decision in DelCostello v. I.B.T., 103 S.Ct. 2281 (1983), be prospective only or be retroactively applied?

PARTIES TO THE PROCEEDING

The parties to this proceeding are Petitioner: Woodrow Mauget (who will hereinafter be referred to as "Petitioner"); and Respondents; Kaiser Engineers, Inc. and Pipe Fitters Union Local No. 392 (hereinafter referred to collectively as "Respondents").

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SUPREME COURT of the UNITED STATES

Term October, 1985

No. _____

WOODROW MAUGET, Petitioner

vs.

KAISER ENGINEERS, INC., et. al.
Respondents

PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals
For The Sixth Circuit

To the Honorable Supreme Court of the United States of America:

Petitioner respectfully petitions this Honorable Court to grant a writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to review a judgment of that Court which affirmed orders of the United States District Court, Southern District of Ohio, Western Division, sustaining the Respondents' motions for dismissal. In its behalf, Petitioner shows unto this Court:

OPINIONS BELOW

The order of the United states Court of Appeals for the Sixth Circuit, dated August 2, 1985, is attached hereto as Appendix A. The orders and opinions of the United States District Court for the Southern District of Ohio, Western Division, filed September 3, 1982 and August 2, 1985, are attached hereto as Appendix B and C.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The decision sought to be reviewed is that of the United States Court of Appeals for the Sixth Circuit, dated August 2, 1985.

The statutory provision believed to confer jurisdiction on this Court to review the judgment below by writ of certiiorari is Section 1254 of Title 28 U.S.C.A., which provides that cases in the United States Court of Appeals may be reviewed by the Supreme Court by writ of certiorari.

STATEMENT OF THE CASE

This was an action for wrongful discharge in breach of a labor agreement and for unfair representation. Plaintiff was a pipefitter at the Zimmer Power Station at Moscow, Ohio. On December 7, 1976 he was discharged for failing to advise the Company of the reason for his absence from work. Plaintiff claimed his wife did in fact notify the Company concerning his illness. The union business agent, acting out of personal hostility towards Plaintiff, arbitrarily refused to process and arbitrate his grievance and the union subsequently refused to refer Plaintiff out for work.

On December 7, 1978 Plaintiff filed a complaint under Section 301 of the LMRA, 29 U.S.C. Section 185 against the employer in the U.S. District Court, Southern District of Ohio. An amended complaint joining the union as a defendant was filed on March 8, 1979.

At the time, UAW v. Hoosier Cardinal, 338 US 696 (1966) advised the lower federal courts to consult analogous state statutes for the applicable statute of limitations in section 301 suits. The Sixth Circuit in Gray vs. International Association, 416 F.2d 313 (6th Cir. 1969) approved a six year Kentucky statute regulating statutory liability. In Ohio there were three cases where the court ruled that a very lengthy statute applied. Devries vs. Interstate Motor Freight System, 91 LRRM 2765 (ND of Ohio January 7, 1976) (6 year statute based on ORC §1302.98 , Dill v. Wood Shovel & Tool Co., 68 LC 12,685 (SD of Ohio 1972) (4 year statute governing fiduciaries), Lowther v. Fred Albrecht Grocery, .97 LRRM 2278 (ND of Ohio 1977) (6 year statute based on ORC §2305.07). In July 1978 the Sixth Circuit, in a Michigan case, approved application of a three year tort statute. Smart v. Ellis Trucking Co., 580 F.2d 215 (6th Cir. 1978).

Plaintiff's counsel, a specialist in representing Plaintiffs in Duty of Fair Representation (DFR) suits, relied upon these authorities.[1]

At the time no authority in the Sixth Circuit even hinted that a short 90 day state arbitration statute or six month NLRB statute might apply. Thus Defendants' answers did not even raise the statute of limitations as a defense.

During the four year period of 1978-1981 the parties engaged in extensive discovery. Pretrial statements were filed as the parties prepared for trial.

In April 1981 the Supreme Court decided the case of United Parcel Services v. Mitchell, 101 S.Ct. 1559 (1981) holding that arbitration statutes applied to 301-DFR suits.

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[1]Every law review article and legal treatise at the time of suit supported Plaintiff's right to rely upon a lengthy limitation period, See, e.g. "Statute of Limitations Governing Fair Representation Actions Against Union When brought with a Section 301 action Against an Employer," No. 4 George Washington Law Review, 418 (1976).

Defendants then amended their answers, pleaded the 90 day statute set forth in ORC 2711.13 as a defense and filed motions to dismiss.

On September 9, 1982 the district court applied the test of Chevron Oil Co. v. Huson, 404 US 97 (1971). The Court noted that "retroactive application (of Mitchell) would thus unfairly punish Plaintiff for his justifiable reliance on settled Sixth Circuit law" but nevertheless, granted Defendants' motions for summary judgment based on other national policies. However, the related DFR claim of wrongfully failing to refer Plaintiff for work out of the union hall survived, because it was not related to the handling of grievances.

On August 2, 1983 the remaining DFR claim against the union was dismissed based on the then recently decided case of DelCostello vs. Teamsters, 103 S Ct. 2281 (1983) which overruled Mitchell and announced the new rule

that courts should apply the six month Section 10(b) rule of the National Labor Relations Act.

In Smith v. General Motors Corp., 747 F.2d 372 (6th Cir. 1984 en banc) the Sixth Circuit decided that the DelCostello decision should be retroactively applied to all hybrid, 301-DFR suits.[2] On August 2, 1985 the Court, relying upon Smith, dismissed Plaintiff's appeal and affirmed the district court judgment.

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[2]The Smith case determined that this court sub silento decided the retroactivity issue in Del Costello by permitting retroactive application of the statute in Del Costello. Earlier decisions of the Sixth Circuit were in conflict concerning whether, on a case by case basis, Chevron standards required prospective only application of Del Costello. Badon v. GMC 679 F.2d 93 (6th Cir. 1982) Pitts v. Frito Lay, Inc. 700 F.2d 330 (6th Cir. 1983) cf Lawson v. Truck Drivers, 698 F.2d 250 (6th Cir. 1983).

HOW FEDERAL QUESTIONS WERE RAISED

Federal questions herein were raised in the briefs in the United States Court of Appeals for the Sixth Circuit.

ARGUMENT: REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I. THE COURT DISREGARDED THE STANDARDS OF CHEVRON v. HUSON, 404 U.S. 97 (1971) FOR DETERMINING WHEN A STATUTE OF LIMITATIONS MAY BE GIVEN RETROACTIVE EFFECT.

In Chevron Oil v. Huson, 404 U.S. 97 (1971), this Court set out a three part test to be followed in determining when a decision should be denied retroactive application:

> "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied...or by deciding an issue of first impression whose resolution was not clearly foreshadowed...Secondly, it has been stressed that 'we must...weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation'... Finally, we have weighed the inequity imposed by retroactive application, for 'where a decision of this Court could produce substantial inequitable results if applied retroactively there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.' at 106-107. (cites omitted)

Here the breach of contract was in 1976. The original complaint was filed in 1978, 22 months later after the date of the unfair representation.

Prior to 1978, the other circuit courts of appeal were in accord with the Sixth Circuit's approval of a lengthy statute in the Gray case (op. cit); DeArroyo Sindicato De Trabajadores Packing House, 425 F.2d 281 (1st Cir. 1970); Abrams v. Carrier Corp. 434 F.2d 1234 (2nd Cir. 1971) cert. denied, 401 U.S. 1009 (1971); Kennedy vs. Wheeling Pittsburgh Steel Corp., 482 F.2d 102 (5th Cir., 1973); Price v. Southern Pacific Transportation Co., 586 F.2d 750 (9th Cir. 1978); Butler v. Teamsters Local 832, 514 F.2d 442 (8th Cir. 1975).

We know of no circuit court decision prior to 1978 that "foreshadowed" the Mitchell or DelCostello decision or that applied a short statute to suits for breach of the duty

of fair representation. Mitchell and DelCostello established new principles which overruled past precedent.

During the period of 1976-1979 no lawyer in America could reasonably have predicted that a 90 day or 6 month statute would apply. Even the district court noted that "at the time the present suit was filed counsel was warranted in believing the appropriate Ohio statute of limitations was either the 6 year limitation period for liabilities created by statute contained in ORC Section 2305.07 or the 2 year period for actions for injuries to person or property contained in ORC 2305.10."

DelCostello was a "clean break" with the past. As observed in McNaughton v. Dillingham Corp., 99 LC 10,688 (9th Cir. 1984)

> "...it is difficult to state that Plaintiffs should have anticipated that the Supreme Court would borrow a federal statute of limitations. Even the Supreme Court in DelCostello notes that such a procedure is unusual."

Retroactive application of DelCostello deprives Plaintiff of any judicial remedy based on an unforeseeable, superseding and brand new doctrine. Denying Plaintiff, who has been diligent, of his day in court is not one of the purposes of DelCostello. In addition, dismissal of this claim will retard the salutory basic purpose of the law favoring 301-DFR suits where there has been a gross injustice.

The instant case was pending over three years before the statute of limitations defense was even raised. Plaintiffs expended a tremendous amount of time, energy and money in reliance on existing law. It would produce an extreme hardship and inequitable result to apply DelCostello retroactively.

Recently this Court has emphasized the reliance, hardship, and inequity factors set forth in Chevron. In Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, (1982) this Court refused to apply retroactively its

decision holding portions of the Bankruptcy Code unconstitutional. The Court noted that retroactive application would "...surely visit substantial injustice and hardship on those litigants who relied on the Act's vesting of jurisdiction in the bankruptcy courts." 458 U.S. at 88, 73 L.Ed.2d at 626. Recently, this Court has refused retroactive application of two of its decisions involving relief under Title VII of the Civil Rights Act of 1964 on similar grounds. Los Angeles Dept. of W & P v. Manhart, 435 U.S. 702, 55 L.Ed.2d 657, 98 S.Ct. 1370 (1978); Arizona Governing Committee v. Norris, 103 S.Ct. 3492, 77 L.Ed.2d 1236, (1983) (per curiam) (Separate Opinions of Powell, J. and O'Connor, J.).

In sum, each of the Chevron factors weighs heavily in petitioner's favor. The Sixth Circuit in Smith erred in its opinion that this Court has already ruled on the

retroactivity issue in DelCostello and also erred by failing to apply the teachings of Chevron to the case at bar.

II. A WRIT OF CERTIORARI IS NECESSARY TO RESOLVE THE CONFLICT THAT EXISTS AMONG THE CIRCUIT COURTS ON THE ISSUE OF THE RETROACTIVITY OFF DELCOSTELLO V.I. B.T. 103 S.Ct. 2281 (1983).

Most recently the Fourth Circuit denied retroactive application of DelCostello in circumstances which "shout of inequity" and where "belated erection of a procedural bar is an unwarranted frustration of reasonable expectations of adjudication on the merits." Zemonick v. Consolidated Coal Company, 103 LC 11,492 (4th Cir. 1985). The 9th Circuit has also refused to apply DelCostello retroactively based upon the Chevron analysis. Edwards v. Teamsters Local Union 36, 719 F.2d 560 (9th Cir. 1984). Reyes Barina v. Gulf Trading and Transportation Co., 100 L.C. 10, 821 (9th Cir. 1984).

However, other Circuits have approved retroactive application of DelCostello. Graves v. Smith's Transfer Corp., 736 F.2d 819 (1st. Cir. 1984); Edwards v. Sea-Land Service, Inc., 720 F.2d 857 (5th Cir. 1983); Rogers v. Lockland-Georgia Co., 720 F.2d 1247 (11th Cir. 1983); Lincoln v. District 9, IAM 99 LC ¶10,665 (8th Cir. 1983); Perez v. Dana Corp., 718 F.2d 581 (3rd Cir. 1983).

Using the test articulated in Chevron, a number of Courts had refused to give the earlier Mitchell decision retroactive application: Kennard v. United States Postal Service, Inc., 531 F.Supp. 1139 (E.D. of Mich. 1982); Engelsburg v. Transcon Lines, 530 F.Supp. 628 (W.D. of Wash. 1982); Tally v. U.S. Postal Service, 532 F.Supp. 786 (D. of Minn. 1982); Singer v. Flying Tiger Line, Inc., 652 F.2d 1349 (9th Cir. 1981) and McFarland vs. International Brotherhood of Teamsters, 535 F.Supp. 970 (N.D. of Texas 1982).

Whether or not a judical decision should be accorded retroactive or merely prospective effect is an issue that arises over and over again. The numerous pronouncements of the various federal courts in DFR cases, in the wake of Mitchell and DelCostello, will have a profound impact on the development of the Chevron doctrine. Unless this Court takes this opportunity to speak, the law will remain in hopeless confusion.

CONCLUSION

The Court below disregarded the rule of Chevron Oil vs. Huson, causing an inequitable dismissal on the eve of trial, after many years of expensive litigation.

Each of the Chevron factors favor Petitioner. DelCostello established a new unpredicted rule of law. Prospective only application of DelCostello will further the purposes of the rule. Petitioner invested

substantial time, money, and energy in justifiable reliance upon a lengthy statute of limitations. It would be unconscionable to destroy his reasonable expectations. Retroactive application would deny Petitioner his "day in Court", and cause extreme harship and produce a gross injustice.

The decisions of the Courts of Appeals vary. The Chevron rule is in disarray and needs clarification. Review on certiorari is therefore necessary.

Respectfully submitted,

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APPENDIX "A"

No. 83-3717

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WOODROW MAUGET	)	
	)	
Plaintiff-Appellant	)	
	)	
v.	)	ORDER
	)	
KAISER ENGINEERS, INC.;	)	
	)	
Defendants-Appellees	)	

BEFORE: ENGEL and JONES, Circuit Judges; and CELEBREZZE, Senior Circuit Judge

This Ohio plaintiff appeals from a district court judgment dismissing his suit filed under §301 of the Labor Management Relations Act, 29 U.S.C. §185, charging his company with illegally discharging him in violation of the collective bargaining agreement, and charging his union with unfair representation and unlawful refusal to refer him to other work.

The plaintiff filed his suit on December 7, 1978 approximately twenty-two months after the union chose not to process his grievance. The district court ultimately dismissed plaintiff's suit pursuant to

DelCostello v. Teamsters, 462 U.S. 151 (1983), for being filed beyond the six month time period contained in §10(b), of the National Labor Relations Act, 29 U.S.C. §160(b). On appeal, the plaintiff argues that DelCostello should not be applied retroactively to bar his case.

Subsequent to the district court's decision, this Court decided in Smith v. General Motors Corp., 747 F.2d 373 (6th Cir. 1984) (en banc), that the DelCostello decision shall be applied retroactively to all hybrid §301 suits. See also Shapiro v. Cook, United, Inc. ____ F.2d ____, slip op. 83- 3087 (6th Cir. May 17, 1985) (per curiam). It is also clear that DelCostello applies to bar plainitff's claim charging the union with unlawful refusal to refer him to other work because this claim is essentially a charge of unfair labor practice which, therefore, necessarily implicates important national policies favoring rapid resolution within six month time period contained in §10(b) of the National Labor Relations Act. See Erkins v. United Steelworkers of America, 723 F.2d 837 (11th Cir.), cert. denied, 105 S.Ct. 3517 (1984).

For these reasons, this panel unanimously agrees that oral argument is not necessary in this appeal. Rule 34(a), Federal Rules of Appellate Procedure. The district court's judgement is, accordingly, affirmed pursuant to Rule 9(d)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

_____

Clerk

APPENDIX "B"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

WOODROW MAUGET	:	No. C-1-78-768
Plaintiff	:	
vs.	:	
KAISER ENGINEERS, INC., et. al.	:	OPINION AND ORDER
Defendants	:	

SPIEGEL, J.:

This case, brought pursuant to §301 of the Labor Management Relations Act (LMRA), 29 U.S.C. §185, is before the Court on the motions for summary judgement filed by defendant Kaiser (doc.31) and defendant Pipefitters (doc. 29). Plaintiff has filed memoranda contra to these original motions (doc. 33, 34) and both defendants filed memoranda in reply (docs. 37, 39). Subsequently, supplements to the summary judgment motions were filed by defendant Kaiser (doc. 48) and defendant Pipefitters (doc. 49). Plaintiff filed a memorandum contra (doc. 51) to which both defendants replied (docs. 53, 54). Plaintiff then, with leave of

Court, filed an additional memoranda contra. Both defendant Kaiser (doc. 55) and defendant Pipefitters (doc. 56) responded in reply.

Plaintiff alleges that in December of 1976 defendant Kaiser terminated his employment at a Moscow, Ohio construction site without just cause and in violation of the applicable collective bargaining agreement. Plaintiff further alleges that the defendant Pipefitters, signatories to the aforementioned collective bargaining contract, failed to fairly represent plaintiff in his attempts to secure reinstatement with defendant Kaiser and, in addition, unfairly refused to refer plaintiff for other employment.

Defendant Kaiser has moved for summary judgment on three grounds. First, that the applicable collective bargaining agreement does not contain a prohibition against discharges without just cause. Second, that the present action, in light of United Parcel Services v. Mitchell, 451 U.S. 56 (1981) and Badon v. General Motors Corp., 679 F.2d 93 (6th Cir. 1982), is barred by the appropriate Ohio statute of

limitations. Third, that the statute of frauds bars plaintiff's reliance on implied or oral contractual agreements.

The union beleives summary judgment is warranted because no genuine issue of material fact exists regarding the union's good faith in representing plaintiff at all times following the disputed discharge and, alternatiively, that the present action is time barred.

Both defendants argue that we should follow the principle of United Parcel Service v. Mitchell, 451 U.S. 56 (1982) and apply the 90 day limitation found in the Ohio arbitration statute, O.R.C. §2711.13, or the six month limitations contained in §10(b) of the National Labor Relations Act (NLRA), 29 U.S.C. §160(b). The defendants correctly note that both the Sixth Circuit and Courts throughout the Southern District of Ohio have applied Mitchell to actions arising prior to the date of decision. Badon v. General Motors Corp., 679 F.2d 93 (6th Cir. 1982); Hudson v. Teamsters Local 957, No. C-3-80-529 (S.D. Ohio Mar. 23, 1982, Rice, J.); Taylor v. Spector Freighting System, Inc., No. C-

2-78-1227 (S.D. Ohio Feb. 11, 1982, Kinneary, J.); Lawson v. Teamsters Local 100, No. C-1-77-324 (S.D. Ohio Oct. 15, 1981, Hogan, J.); D'Andrea v. American Postal Workers, No. C-1-78-520 (S.D. Ohio Aug. 4, 1981, Spiegel, J.) Nevertheless, another Sixth Circuit panel has discussed the limitations issue and did not give Mitchell retroactive application. Newton v. Electrical Workers Local 801, No. 81-3045 (6th Cir. Aug. 4, 1982). We must emphasize that in both Badon and our decision in D'Andrea, the issue of retroactivity was not fully briefed and argued. For that reason, those decisions do not control the disposition of the limitations issue in the instant action. In addition, our careful reading of Newton leads us to conclude that the retroactivity of Mitchell was similarly not at issue before that particular panel of the Circuit. Each party to the instant action, however, has briefed the issue of Mitchell's application in a vigorous and competent fashion. Accordingly, we will now address the issue of Mitchell's application consistent with federal law regarding retroactive application of civil rules of decision.

The instances where noncriminal and nonconstitutional decisions are applied prospectively only are extremely rare. The determination of whether to so limit a particular decision's application involves the equitable balancing of several factors. Among these are whether the Supreme Court's decision surprised counsel in that it either overruled well established precedent or decided an issue of first impression which was subject to rational disagreement and the ultimate resolution of which could not be foreseen. Chevron Oil Co. v. Hudson, 404 U.S. 97, 106 (1971) citing Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481, 496 (1968); Allen v. State Board of Educations, 393 U.S. 544, 572 (1969). The court should also consider the policies served by the decision and determine whether non-retroactive application will impede the promotion of those policies. Chevron Oil at 106-107 citing Linkletter v. Walker, 381 U.S. 618, 629 (1965). In addition, the Court should consider whether retroactive application would produce substantial injustice or hardship. Chevron Oil, at 107 citing Cipriano v. City of Houma,

395 U.S. 701, 706 (1969). Because the determinative process is essentially equitable, we decline to consider these factors in a mechanical fashion. Rather, we must decide whether the weight of these facts tips substantially in favor of prospective application. But see, Cochran v. Birkell, 651 F.2d 1219, 1223 n.8 (6th Cir. 1981) quoting Valencia v. Anderson Brothers Ford, 617 F.2d 1278, 1289 (7th Cir. 1980) (All three Chevron Oil factors must favor prospective-only application).

Plaintiff argues with a great amount of persuasion that the lawsuit was filed nearly two years after plaintiff's discharge in reliance on settled case law in this Circuit. The Sixth Circuit had consistently held that hybrid §301 actions against employers for breach of contract and union for breach of the duty of fair representation sound in tort. In accordance with the Supreme Court's decision in United Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696 (1966), that Courts should apply the most analogous state statute of limitation, the Sixth Circuit had applied Michigan's three year statute of limitations

for actions involving injury to person or property. Smart v. Ellis Trucking Co., Inc., 500 F.2d 215 (6th Cir. 1978). In Gray v. Asbestos Workers Local 51, 416 F.2d 313 (6th Cir. 1969) the Sixth Circuit found that Kentucky's five year limitations statute for actions based on liabilities created by statute was appropriate. Thus, at the time the present suit was filed, counsel was warranted in believing that the appropriate Ohio statute of limitations was either the six year limitations period for liabilites created by statute contained in O.R.C. §2305.07, or the two year period for actions for injuries to person or property contained in O.R.C. §2305.10. Because application of Mitchell would result in dismissal of plaintiff's action, retroactive application would thus unfairly punish plaintiff for his justifiable reliance on settled Sixth Circuit law.

We are aware of at least one other obvious indicia of unfairness that would result from Mitchell's retroactive application. Depriving plaintiff of his day in Court, through no foreseeable fault of his own, is inconsistent with the body of federal labor law

which sought to protect the rights individual union members won through collective bargaining against arbitrary treatment by statutorily recognized bargaining representatives. The Supreme Court, from Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944) to Vaca v. Sipes, 386 U.S. 171 (1967) has recognized that the best means of protecting these rights is to provide an effective method for their vindication. Should we apply Mitchell and dismiss plaintiff's suit, we would push this effective method of vindication beyond plaintiff's grasp.

In addition to considering the inequities caused by retroactive application, Chevron Oil counsels that we must identify the policies underlying the Supreme Court's decision in Mitchell and determine whether non-retroactive application would impede the promotion of these policies.

In likening a hybrid §301 action to an action to vacate an arbitration award, thereby calling for the application of the short statute of limitations governing such actions, the Mitchell Court stated that short limitations periods promote the "relatively rapid

disposition of labor disputes." 451 U.S. at 63 quoting United Auto Workers v. Hoosier Cardinal, 383 U.S. 696, 707 (1966). As the Mitchell Court noted, swift resolution of labor disputes is a fundamental policy of federal labor law. This policy is reflected throughout the text of the NLRA. In §1 Congress detailed the obstruction and burdens upon commerce caused by labor disputes. In order to lessen the destructive effect of such burdens and obstructions, Congress sought to ensure expedited resolution of labor disputes in § 10(b) by creating a short six month statute of limitations for unfair labor practice charges.

Non-retroactive application of Mitchell in the instant action would frustrate this fundamental policy. Rather than eliminate the deleterious effect of a labor dispute by encouraging immediate action to vindicate disputed rights, non-retroactive application would here only permit the underlying controversy to remain at issue.

In addition, the Mitchell Court beleived that application of short limitaitons statutes to §301 actions assists in affording finality to decisions

generated by the grievance resolution procedures created through collective bargaining. 451 U.S. at 63. The policy favoring private resolution of labor disputes is perhaps the most fundamental in federal labor law. Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960). The NLRB also prefers private resolution of labor disputes, and despite the extent of its expertise and jurisdiciton, has a settled policy of accomodating decisions rendered by private procedures. Collyer Insulated Wire, 192 NLRB 837, 77 LRRM 1931 (1971), Spielberg Manufacturing Co., 112 NLRB 1080, 36 LRRM 1152 (1955). Indeed, Congress has made this policy part of the United States Code. 29 U.S.C. §173(d) provides:

> Final judgment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

In order to encourage management and labor to utilize bargained for grievance resolution procedures, decisions from such procedures must be afforded a great degree of finality. Because the ongoing process of private grievance resolution gives content and meaning to the collective bargaining agreement, anything which draws the finality of such decisions into question disruptes the legitimate expectations of the parties and their understanding of the rights and duties created by agreement. For example, judicial interpretation of a collective bargaining agreement in a §301 suit filed three years after the disposition of the grievance in question might so alter the parties' understanding of their rights as to render the last three years of harmonious "industrial self-government" meaningless. 451 U.S. at 64. For this reason, Mitchell requires those persons objecting to the ultimate disposition of a grievance or the fairness of the process itself to do so within a relatively brief time.

Non-retroactive application of Mitchell in the case at bar would unduly obstruct the policy of affording finality to the private grievance resolution process. Considering the importance of promoting this policy and the policy favoring swift resolution of labor disputes, we cannot state with the requisite degree of conviction that the obvious inequities to plaintiff arising from application of Mitchell weigh substantially in favor of prospective only application. Accordingly, we rule that Mitchell controls in the present case.

Our review of two recent Sixth Circuit opinions Newton v. Electrical Workers, Local 801, No. 81-3045 (6th Cir. Aug. 4, 1982) and Badon v. General Motors Corp., 679 F.2d 93 (1982) forces us to conclude that plaintiff's claim for wrongful discharge against defendant Kaiser and for unfair representation in connection with the defendant Pipefitter's handling of plaintiff's discharge grievance are time-barred.

In construing Mitchell, the Badon Court held that in §301 actions brought in this Circuit, the state statute of limitations pertaining to vacation of

arbitration award is, in most circumstances, appropriate. The arbitration limitations period applies in all situations where the employment decision which is the subject matter of the §301 suit has become final through the operation of a collectively bargained-for dispute resolution process. 679 F.2d at 98. The Badon Court did fashion one exception to the applicability of the arbitration limitations period. When a state, in enacting the arbitration statute, enunciates a clear policy of excluding labor disputes from the state system of vacation of arbitration awards, federal courts must recognize that policy and apply the six month limitation period contained in NLRA §10(b). 29 U.S.C. § 160(b). 679 F.2d at 99.

We hereby rule that the 90 day limitation period provided for vacation of arbitration awards contained in O.R.C. § 2711.13 applies to the claims against defendant Kaiser and the unfair representation claims against the defendant Pipefitters which concern the handling of plaintiff's grievance. Unlike the Michigan statute before the Badon Court, Ohio has not enunciated a clear policy of excluding labor disputes from the

vacation of arbitration awards under O.R.C. § 2711.13 Moreover, although the disputed dishcarge in the present case was not submitted to arbitration, the discharge became final after the union chose not to pursue the grievance through the procedures created by the collective bargaining agreement. As the Badon Court emphasized, the applicability of the arbitration limitations period depends only on whether the parties have agreed upon a system to settle disputes among themselves. The Court stated:

> It is not arbitration per se that federal policy favors, but rather final judgment of differences by a means selected by the parties.

679 F.2d at 98, quoting U.M.W. v. Barnes & Tucker Co., 561 F.2d 1093, 1096 (3d Cir. 1977).

In holding the 90 day vacation of arbitration awards statute applicable, we are not unaware of the Sixth Circuit's recent opinion in Newton v. Electrical Workers Local 801, No. 81-3045 (6th Cir. Aug. 4, 1982). In Newton, the Court held that it was not error for the District Court in 1979 to dismiss a §301 claim against an employer and union on the basis of Ohio's six year limitations period. For liabilities created by

statute. We note here, however, that the issues before the Newton Court was whether the District Court should have applied a longer limitations period. The Court only decided that the District Court, at the time of the decision, did not err in applying a shorter limitiatons period than that requested by the plaintiff. The Court did not address the question that we decide here today, viz, in light of Mitchell, what is the most appropriate Ohio statute of limitations in hybrid § 301 actions, however, does not mean that plaintiff's entire suit is time-barred. Plaintiff has alleged that the Defendant Pipefitters represented plaintiff unfairly in matters unrelated to defendant Kaiser's alleged wrongful discharge. In particular, plaintiff claims that the Defendant Pipefitters' refused to refer plaintiff out of the union hiring hall after the original discharge decision became final. This claim, which involves only the plaintiff and defendant union, is not subject to the grievance procedure of the collective bargaining contract. This unrelated claim is therefore not governed by the 90 day limitations period of O.R.C.

§ 2711.13. Because this claim involves an alleged breach of a duty implied from the union's statutorily authorized status as plaintiff's collective bargaining representative, we believe, consistent with Newton, that the action arising out of the defendant Pipefitters' referral practices is governed by the six year limitations period for liabilities created by statute contained in O.R.C. §2305.07.

Accordingly, the motion of defendant Kaiser for summary judgment is granted. The motion of the defendant Pipefitters for summary judgment is granted in part. The motion is denied as to plaintiff's claims concerning the defendant Pipefitters' referral practices occurring after the discharge became final.

The defendant Pipefitters, however, contend that summary judgment is warranted on the remaining unfair representation claim on an additonal ground. The defendant Pipefitters argue that plaintiff's failure to comply with known procedures made plaintiff ineligible for referral.

Plaintiff, on the other hand, claims full compliance with the hiring hall procedures. In support of this contention, plaintiff points to several passages from his deposition which indicate compliance. The defendant Pipefitters, however, have noted two instances where plaintiff contradicts this testimony. We have reviewed the substance of these passages and are forced to conclude that an issue of fact exists as to whether plaintiff complied with the referral procedures. We reach this conclusion because under Rule 56(c) Fed.R.Civ.P. we must consider the evidence and all the inferences in a light most favorable to plaintiff. Smith v. Hudson, 600 F.2d 60 (6th Cir.) cert. dismissed 444 U.S. 986 (1979); Watkins v. Northeastern Ohio Tractor Pullers Association, Inc., 630 F.2d 1155 (6th Cir. 1980). Accordingly, summary judgment on the remaining claim is not appropriate and must be denied.

SO ORDERED.

S. Arthur Spiegel
United States District Judge

APPENDIX "C"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

WOODROW MAUGET	:	NO. C-1-78-768
Plaintiff	:	
vs.	:	
KAISER ENGINEERS, INC., et. al	:	OPINION AND ORDER GRANTING MOTION TO
Defendants	:	DISMISS OF DEFENDANT PIPEFITTERS LOCAL NO. 392

SPIEGEL, J.

This matter came on for consideration of the motion of defendant Pipe Fitters Local No. 392 (doc. 79) to dismiss, plaintiff's memorandum in opposition (doc. 80), and defendant Pipe Fitters' reply (doc. 81). the basis for defendant's motion to dismiss is the decision of the United States Supreme Court in DelCostello v. International Brotherhood of Teamsters, et. al., Case No. 81-2386 and United Steel Workers of America v. Donald C. Flowers and King E. Jones, Case No. 81-2408, issued June 8, 1983, holding that the six months' limitations period of Section 10(b) of the

National Labor Relations Act is the statute of limitations applicable to an unfair representation claim by an employee against a union. Heretofore in this case, we held that plaintiff's remaining claim against his Local for failing to refer plaintiff out of the Union Hiring Hall after the original dishcarge decision became final was governed by the Ohio six-year limitations period provided for in Section 2305.07, O.R.C. Defendant contends that the Supreme Court's decision establishing the six-month limitation period is applicable and binding on this Court.

Plaintiff responds that the aforesaid Supreme Court decisions should not be applied retroactively, citing Pitts v. Frit-O-Lay, 700 F.2d 330 (6th Cir. 1983). Pitts applied the factors set forth in Chevron Oil v. Hudson, 404 U.S. 97 (1971) regarding retroactivity and concluded that the six month statute of limitations established in response to United Parcel Service v. Mitchell, 451 U.S. 56 (1981), not be given retroactive effect. However, we are persuaded by the reasoning of the defendant in its reply brief (doc. 81), which points out that Pitts was decided before

DelCostello. Further on the same date that Pitts was decided, the Sixth Circuit also affirmed D'Andrea v. American Postal Workers, Case No. 81-3548, ____ F.2d , 1983, which dismissed plaintiff's §301 action because it was not filed within the time required by the Ohio statute of limitations set forth in O.R.C. § 2711.13, providing for a three months' period within which a motion to vacate an arbitration award must be filed. In that case, D'Andrea had waited three years after the arbitration decision to commence the §301 action. D'Andrea was decided in the District Court after Mitchell, which held that where a discharged employee brings a §301 suit against his employer for breach of the collective bargaining agreement following an adverse arbitration award and against his Union for breach of the duty of fair representation, the action should be characterized as one to vacate an arbitration award. The District Court applied Mitchell retroactively in D'Andrea and the Sixth Circuit affirmed. To similar effect, see Lawson v. Truck Drivers, 698 F.2d 250 (6th Cir. 1983), which held that Mitchell applies retroactively to pending cases.

Further, under the Chevron analysis concerning retroactivity, we conclude that DelCostello may be applied retroactively. The policy of federal labor always has been swift resolution of disputes. To the extent that DelCostello requires quick filing of complaints, it establishes no new principles of law or overrules clear past precedent. Rather, it clarfies an ambiguity and we do not believe it is unjust to apply it retroactively in this case.

Accordingly, it is the conclusion of the Court that defendant's motion to dismiss should be granted. It is hereby ordered that defendant's motion to dismiss is granted and defendant Pipe Fitters Local No. 392 is hereby dismissed from this action. Because there are no remaining defendants, this case is hereby dismissed.

SO ORDERED.

S. Arthur Spiegel
United States District Judge

BEST AVAILABLE COPY

No. 85-725

Supreme Court, U.S.
FILED
NOV 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

WOODROW MAUGET,

Petitioner,

vs.

KAISER ENGINEERS, INC.,

and

PIPE FITTERS UNION LOCAL NO. 392,

Respondents.

On Petition for A Writ of Certiorari to the United States Court Of Appeals for the Sixth Circuit

---

BRIEF FOR RESPONDENT KAISER ENGINEERS, INC. IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the court below properly give retroactive effect to *DelCostello* v. *International Brotherhood of Teamsters*?

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No. 85-725

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

WOODROW MAUGET,

Petitioner,

vs.

KAISER ENGINEERS, INC.,*

and

PIPE FITTERS UNION LOCAL NO. 392,

Respondents.

On Petition for A Writ of Certiorari to the United States Court Of Appeals for the Sixth Circuit

---

BRIEF FOR RESPONDENT KAISER ENGINEERS, INC. IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. A1-A3) was not reported. Nor was the district court's opinion and order dismissing the claims against Respondent Pipe Fitters Union Local No. 392 (Pet. App. C1-C4) reported. The district court's opinion and order granting summary judgment in favor of Respondent Kaiser Engineers, Inc. (Pet. App. B1-B18) appears at 546 F. Supp. 486 (S.D. Ohio 1982), *appeal dismissed without opinion*, 708 F.2d 725 (6th Cir. 1983).

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* Pursuant to this Court's Rule 28.1, the subsidiaries (except wholly owned subsidiaries) and affiliates of Kaiser Engineers, Inc. are Raymond Engineers Australia Pty. Limited, Kaiser Engineers Power Corporation, and Phillips Barratt Kaiser Engineering Limited.

JURISDICTION

The court of appeals entered its judgment (Pet. App. A1-A3) on August 2, 1985. The petition for a writ of certiorari was filed October 29, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), set forth in Appendix A.

COUNTERSTATEMENT OF THE CASE

Petitioner Woodrow Mauget was employed pursuant to a collective bargaining agreement between Respondents Kaiser Engineers, Inc. ("Kaiser") and Pipe Fitters Union Local No. 392 ("the Union"). On December 7, 1976, Kaiser discharged Mauget for violating a work rule by being absent three consecutive days without notification. Mauget, claiming he had in fact notified Kaiser, contacted a Union steward and business agent about the discharge. An investigation by the Union revealed no information to suggest Mauget's termination was in error, and the Union therefore did not further process Mauget's grievance.

Mauget filed an unfair labor practice charge against the Union with the National Labor Relations Board in June 1977. During the Board's investigation, Mauget contended the Union had caused Kaiser to rescind his reinstatement, had unlawfully declined to pursue his grievance, and had refused to refer him to other employment subsequent to his termination. The Board, on October 26, 1977, affirmed that Mauget's charge was without merit.

Over thirteen months later — and exactly two years after his discharge — Mauget sued Kaiser under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, for

breach of the collective bargaining agreement. He subsequently amended the complaint on March 8, 1979, by joining the Union as a defendant for an alleged breach of its duty to fairly represent him.

Relying on *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56 (1981), which held that a state's statute of limitation for vacating arbitration awards controlled a § 301 action against an employer, the district court dismissed as untimely Mauget's claims against Kaiser and most of his claims against the Union. Those claims, the court reasoned, were not filed within the three-month limitations period for vacating arbitration awards specified in Ohio Rev. Code § 2711.13. Construing Mauget's amended complaint against the Union to include a claim for unlawful refusal to refer Mauget out of the hiring hall for work subsequent to his discharge, the district court refused to dismiss the latter claim. Instead, the court ruled timely that portion of the amended complaint, as required by Ohio's six-year limitations period for liabilities created by statute, Ohio Rev. Code § 2305.07.

This Court thereafter directed in *DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S. 151 (1983), that the six-month statute of limitations in section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), governs employee actions against employers for breach of a collective bargaining agreement and against unions for breach of the duty of fair representation. The district court, according retrospective effect to *DelCostello*, ultimately dismissed as untimely Mauget's remaining claim against the Union.

On appeal, the Sixth Circuit affirmed both rulings of the district court. The appellate court, adhering to its decision in *Smith* v. *General Motors Corp.*, 747 F.2d 372 (6th Cir. 1984) (*en banc*), applied *DelCostello* retroactively to bar Mauget's suit.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW CORRECTLY DETERMINED, IN ACCORDANCE WITH THIS COURT'S RETROACTIVE APPLICATION OF *DELCOSTELLO*, THAT *DELCOSTELLO* WAS NOT LIMITED TO PROSPECTIVE FORCE.

This Court, after concluding in *DelCostello* that hybrid § 301/duty of fair representation suits had to be brought within six months of their accrual, declined to give its ruling prospective only effect. The Court reversed and remanded *DelCostello* for consideration of whether certain events had tolled the running of the limitations period so as to save the otherwise time-barred claims. In *DelCostello's* companion case, *United Steelworkers* v. *Flowers*, 462 U.S. 151 (1983), the Court reversed and held the action untimely because it was filed more than ten months after accrual.

Concluding this Court's retroactive application of the six-month limitations period in *DelCostello* and *Flowers* was no idle exercise, the full Sixth Circuit, in *Smith* v. *General Motors Corp.*, 747 F.2d 372 (6th Cir. 1984) (en banc), reasoned:

> [T]he Supreme Court implicitly held in *DelCostello* that the statute of limitations should be applied retroactively by barring the claim that was in front of the Court. . . . If the Supreme Court had not intended for *DelCostello* to apply retroactively, the Court easily could have reserved the issue or could have applied the statute of limitations prospectively, as it did in *Chevron* [*Oil Co.* v. *Huson*, 404 U.S. 97 (1971)]. By applying the statute of limitations to extinguish the claim in the case before the Court, we feel the Supreme Court demonstrated its intent to apply *DelCostello* retroactively. Accordingly, we hold that the sixth-month statute of limitations for hybrid, section 301/unfair representation claims is applicable to all cases pending at the time *DelCostello* was decided.

747 F.2d at 375. *Accord Welyczko* v. *U.S. Air, Inc.*, 733 F.2d 239 (2d Cir. 1984), *cert. denied*, __ U.S. __, 105 S. Ct. 512 (1984); *Zemonick* v. *Consolidated Coal Co.*, 762 F.2d 381 (4th Cir. 1985) (Ervin, C.J., dissenting). *See also Barnett* v. *United Air Lines, Inc.*, 738 F.2d 358 (10th Cir. 1984), *cert. denied*, __ U.S. __, 105 S. Ct. 594 (1984) (citing *Welyczko* and applying *DelCostello* retroactively).

The present suit, consistent with the directive in *Smith* v. *General Motors*, was dismissed by the appeals court. In doing so, the Sixth Circuit correctly followed this Court's lead in *DelCostello* and also adhered to the well-settled principle that generally "an appellate court must apply the law in effect at the time it renders its decision." *Thorpe* v. *Housing Authority*, 393 U.S. 268, 281 (1969) (footnote omitted). The writ accordingly shoud be denied.

II. ASSUMING, ARGUENDO, THAT *DELCOSTELLO*'S RETROACTIVITY IS TO BE ANALYZED ACCORDING TO THE *CHEVRON OIL* CRITERIA, THIS COURT'S REVIEW IS UNNECESSARY.

Petitioner urges that the court below erred in dismissing his lawsuit based on *Smith* v. *General Motors*. Instead, contends Petitioner, the Sixth Circuit was bound to decide this case in compliance with *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), despite this Court's having given retroactive effect to the six-month statute of limitations in *DelCostello* and *Flowers* without a *Chevron* analysis. Many appeals courts have examined the three *Chevron* criteria and concluded they favor retroactive force for *DelCostello*. *Local Union 1397* v. *United Steelworkers*, 748 F.2d 180 (3d Cir. 1984); *Landahl* v. *PPG Industries, Inc.*, 746 F.2d 1312 (7th Cir. 1984); *Graves* v. *Smith's Transfer Corp.*, 736 F.2d 819 (1st Cir. 1984); *Murray* v. *Branch Motor Express Co.*, 723 F.2d 1146 (4th Cir. 1983), *cert. denied*, __ U.S. __, 105 S. Ct. 292 (1984); *Lincoln* v. *District 9, International Association of Machinists*, 723

F.2d 627 (8th Cir. 1983); *Perez* v. *Dana Corp.*, 718 F.2d 581 (3d Cir. 1983); *Rogers* v. *Lockheed-Georgia Co*, 720 F.2d 1247 (11th Cir. 1983), *reh'g denied*, 727 F.2d 1116 (11th Cir. 1984), *cert. denied*, __ U.S. __, 105 S. Ct. 292 (1984); and *Edwards* v. *Sea-Land Service, Inc.*, 720 F.2d 857 (5th Cir. 1983).

This overwhelming authority makes clear that the Sixth Circuit would have reached the same result had it utilized a *Chevron* approach in this case or in *Smith* v. *General Motors*, upon which the dismissal order was based. Indeed, both the concurrence and the dissent in *Smith* opined that *DelCostello* properly was accorded retrospective effect in Ohio under the *Chevron* standards. 747 F.2d at 376 (Merritt, J., concurring); 747 F.2d at 380 n.5 (Krupansky and Wellford, JJ., dissenting).

Recasting the lower court's analytical framework simply would lead again to the conclusion that *DelCostello* has retroactive force.[1] Petitioner therefore is not entitled to the Court's examination of this case.

---

[1] Petitioner can find no solace in the *Chevron* factors in any event. He cites no Sixth Circuit case predating *Mitchell* or *DelCostello* establishing the statute of limitations for an Ohio plaintiff in a hybrid § 301/fair representation action. The petition wholly fails to demonstrate that retrosective application of *DelCostello* will retard the objectives — providing uniformity, assuring a satisfactory opportunity to vindicate employee rights, and promoting relatively rapid resolution of labor disputes — underlying *DelCostello*. Nor are the equities on Petitioner's side; his NLRB charge, which mirrored in all significant respects his allegations in the lawsuit, was resolved against him nearly eleven months after Kaiser terminated him, yet he waited over thirteen more months before suing Kaiser and over sixteen more months before suing the Union.

III. *DELCOSTELLO*'S RETROACTIVITY IS NOT OF SUFFICIENT IMPORTANCE TO WARRANT CONSIDERATION BY THIS COURT.

The retroactivity of *DelCostello* does not deserve this Court's attention. Certiorari has been denied numerous times before, notwithstanding the apparent conflict among the circuits' approaches to the issue. *Scaglione* v. *Communications Workers*, 759 F.2d 201 (1st Cir. 1985), *cert. denied*, __ U.S. __, 54 U.S.L.W. 3271 (U.S. Oct. 22, 1985) (No. 85-416); *Aragon* v. *Federated Department Stores, Inc.*, 750 F.2d 1447 (9th Cir. 1985), *cert. denied*, __ U.S. __, 54 U.S.L.W. 3252 (U.S. Oct. 15, 1985) (No. 85-264); *Saville* v. *Westinghouse Electric Corp.*, 760 F.2d 261 (3d Cir. 1985), *cert. denied*, __ U.S. __, 54 U.S.L.W. 3251 (U.S. Oct. 15, 1985) (No. 84-2034); *Greyhound Lines, Inc.* v. *Wilhite*, 760 F.2d 278 (9th Cir. 1985), *cert. denied*, __ U.S. __, 54 U.S.L.W. 3251 (U.S. Oct. 15, 1985) (No. 84-2016); *Glover* v. *United Grocers, Inc.*, 746 F.2d 1380 (9th Cir. 1984), *cert. denied*, __ U.S. __, 105 S. Ct. 2357 (1985); *Barnett* v. *United Air Lines, Inc.*, 738 F.2d 358 (10th Cir. 1984), *cert. denied*, __ U.S. __, 105 S. Ct. 594 (1984); *Welyczko* v. *U.S. Air, Inc.*, 733 F.2d 239 (2d Cir. 1984), *cert. denied*, __ U.S. __, 105 S. Ct. 512 (1984); *Rogers* v. *Lockheed-Georgia Co.*, 720 F.2d 1247 (11th Cir. 1983), *reh'g denied*, 727 F.2d 1116 (11th Cir. 1984), *cert. denied*, __ U.S. __, 105 S. Ct. 292 (1984); *Murray* v. *Branch Motor Express Co.*, 723 F.2d 1146 (4th Cir. 1983), *cert. denied*, __ U.S. __, 105 S. Ct. 292 (1984); and *McNaughton* v. *Dillingham Corp.*, 722 F.2d 1459 (9th Cir. 1984), *cert. denied*, __ U.S. __, 105 S. Ct. 291 (1984).

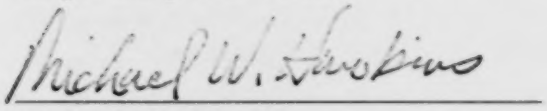
The Court's consistent declination to review is understandable. *DelCostello*'s retroactivity is at best an issue of academic interest, for no more hybrid § 301/duty of fair representation cases antedating *DelCostello* can be initiated. That species of case, moreover, soon will become extinct. Indeed, one court has recognized: "This problem will shortly go away, if it is not already gone . . ." *Zemonick* v. *Consolidated Coal Co.*, 762 F.2d 381, 389 (4th Cir. 1985). Because the retroactivity of *DelCostello* bears on a small, finite, and ever narrowing

group of litigants, this Court's discretionary review ought not to be devoted to this case.

CONCLUSION

For the reasons set forth above, Respondent Kaiser Engineers, Inc. requests that the writ be denied.

Respectfully submitted,



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APPENDIX A

29 U.S.C. § 160. Prevention of unfair labor practices — Powers of Board generally

* * *

(b) Whenever it is charged that any person has engaged in or is engaging in any . . . unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . .

29 U.S.C § 185. Suits by and against labor organizations

* * *

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Supreme Court, U.S.
FILED
NOV 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-725

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1985

WOODROW MAUGET

Petitioner,

vs.

KAISER ENGINEERS, INC.
PIPE FITTERS UNION LOCAL NO. 392

Respondents.

MEMORANDUM OF RESPONDENT PIPEFITTERS UNION LOCAL NO. 392 IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Should the decision in DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983) be prospective only or be retroactively applied?

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IN THE SUPREME COURT OF THE UNITED STATES
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WOODROW MAUGET

Petitioner,

vs.

KAISER ENGINEERS, INC.
PIPE FITTERS UNION LOCAL NO. 392

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MEMORANDUM OF RESPONDENT PIPEFITTERS UNION LOCAL NO. 392 IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

COUNTERSTATEMENT OF THE CASE

This case was brought under Section 301 of the NLRA, 29 U.S.C. §185 by an employee (Mauget) who was terminated from

his employment at the Zimmer Nuclear Power Station on December 7, 1976. Mauget had been referred to such employment through the hiring hall maintained by Pipefitter's Union Local No. 392. The employer, Kaiser Engineers, Inc., had a rigidly enforced rule that provided for termination of any employee who was absent for over three days without giving notice to the employer. Mauget was terminated from his employment for being absent for over three days without giving the requisite notice. Mauget claimed that he did in fact call in sick. There was not, however, any record of his call in the telephone logs maintained by the Employer. Mauget claimed that the Union interfered with his reinstatement on December 7, 1976, refused to process his

"grievance" and refused to refer him to other employment in January and February of 1977. The Union, of course, denied these allegations.

Mauget presented his claims to Region 9 of the National Labor Relations Board and unfair labor practice charges were filed in June, 1977 against both Local No. 392 and Mauget's own Union, Plumber's Local 59. After a thorough investigation, the regional director of the NLRB dismissed the claims as groundless on August 19, 1977. This dismissal was appealed by Mauget's present counsel but was nevertheless affirmed on October 26, 1977.

Over a year later, on December 7, 1978, Mauget filed his Section 301 suit against the Employer only. He later

filed an amended complaint joining Local No. 392 on March 8, 1979, two years and three months after his discharge.

Following the Supreme Court's decision in United Parcel Service v. Mitchell, 451 U.S. 56 (1981), the Employer and the Union moved for summary judgment on the basis of Mitchell. The issue of retroactivity was extensively briefed by the parties. Each party briefed and argued the case under the retroactivity standards contained in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). The district court judge performed a lengthy Chevron analysis and rendered his decision on September 9, 1982. The court applied Mitchell retroactively and dismissed Mauget's claims against both the Employer and the Union which related to his

discharge by the Employer and the Union's representation of him in connection with the discharge. The district court, however, read Mauget's amended complaint as containing within it a subsidiary claim that the Union had treated him unfairly in refusing him referrals after his discharge from his employer. These refusals allegedly took place between the December 7, 1976 discharge and the end of February, 1977. The district judge held that this claim was not governed by the Mitchell statute but by the Ohio six year statute for liabilities arising under statute, O.R.C. §2305.07. This claim was not, therefore, dismissed.

Following the Supreme Court's decision in DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151

(1983), the Union moved for dismissal of the claim remaining against it. The retroactivity issue and the Chevron factors were again briefed and argued. On August 2, 1983, the district court applied DelCostello retroactively and granted the Union's motion to dismiss. The district judge concluded that DelCostello could be applied retroactively "under the Chevron analysis concerning retroactivity." The judge further concluded that DelCostello established no new principles of law nor overruled past precedent. The judge found that it was not "unjust" to apply DelCostello retroactively in this case.

Mauget appealed to the Sixth Circuit from both the September 9, 1981 decision and the August 2, 1983 decision. The

issue in the Court of Appeals was whether the district court committed error in applying Mitchell and DelCostello retroactively. The parties again briefed the retroactivity issue under the Chevron standard. While the case was awaiting oral argument, the Sixth Circuit decided Smith v. General Motors Corp., 747 F. 2d 372 (6th Cir., 1984) (en banc). Following its decision in Smith, the Sixth Circuit applied DelCostello retroactively and affirmed the decisions of the district court.

ARGUMENT

The question presented in this case has neither novelty nor special importance to recommend it. In the previous

petitions presenting this question to the Court, certiorari has been denied. Greyhound Lines, Inc. v. Melody Wilhite, ___ U.S. _____, No. 84-2016, slip opinion, October 15, 1985; Raymond L. Saville, Jr. v. Westinghouse Electric Corp. and United Electrical Radio and Machine Worker's of America, Local 107, ___ U.S. _____, No. 84-2034, slip opinion, October 15, 1985; Glover v. United Grocers, Inc., 746 F. 2d 1380 (9th Cir., 1984), cert. denied, ____ U.S. _____, 105 S.Ct. 2357 (1985); Welyczko v. U.S. Air, Inc., 733 F. 2d 239 (2d. Cir., 1984), cert. denied, ____ U.S. _____, 105 S.Ct. 512 (1984); Rogers v. Lockheed-Georgia Co., 720 F. 2d 1247, (11th Cir., 1983), cert. denied, ____ U.S. _____, 105 S.Ct. 292 (1984); Murray v. Branch Motor Express

Co., 723 F. 2d 1146 (4th Cir., 1983), cert. denied, ____ U.S _____, 105 S.Ct. 292 (1984); Ernst v. Indiana Bell Telephone Co., 717 F. 2d 1036 (7th Cir., 1983) cert. denied, ____ U.S. _____, 104 S.Ct. 707 (1984); Edwards v. Teamsters Local No. 36, 719 F. 2d 1036 (9th Cir., 1983), cert. denied, ____ U.S. _____, 104 S.Ct. 1599 (1984).

For the reasons set forth below, certiorari should be denied in this case as well.

I. THE COURT BELOW WAS CORRECT IN AFFIRMING DISMISSAL OF THIS CASE WITHOUT ENGAGING IN AN INDEPENDENT CHEVRON ANALYSIS.

The Sixth Circuit's decision in this case was based on its previous en banc

decision in Smith v. General Motors Corp., supra. The court held, in Smith, that the six month statute of limitations for hybrid Section 301/unfair representations claims was applicable to all cases pending at the time DelCostello was decided. The court followed the reasoning of the Second Circuit expressed in Welyczko v. U.S. Air, Inc., supra, that the Supreme Court implicitly held that the six month statute should be applied retroactively since the court in fact applied it retroactively in DelCostello to bar the claim of one of the employee-litigants. Relying on this rationale, the court concluded that there was no need for ad hoc Chevron analysis of each pending case.

There was no need for the Sixth

Circuit to perform a Chevron review in Smith or in this case because the application of the Chevron test in any of these cases leads inevitably to the conclusion that DelCostello applies retroactively. Retroactive application is the rule rather than the exception. A court is to apply the law in effect at the time of decision unless doing so would result in manifest injustice. Bradley v. Richmond School Board, 416 U.S. 696, 711 (1974). The test for determining whether a decision will have only prospective application has three parts. Chevron Oil Co. v. Huson, supra, at 106-107. In Chevron, the court stated:

> In our cases dealing with the non-retroactivity question, we have generally considered three separate factors. First, the decision to be applied non-retroactively must

> establish a new principle of law, either by overruling clear past precedent on which litigants may have relied ... or by deciding an issue of first impression whose resolution was not clearly forshadowed ... Second, it has been stressed that "we must ... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." ... Finally, ... where a decision of this Court could produce substantial inquitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of non-retroactivity." Chevron Oil Co. v. Huson, supra, at 106, 107.

While the Supreme Court has not yet stated specifically that all three tests must be satisfied to avoid retroactivity, the Court did, in Chevron itself, identify the factors as "three separate factors." Chevron, supra, at 106. Several circuit courts have found the factors to

be distinct and discrete See, Rogers v. Lockheed-Georgia Co., supra, (11th Cir., 1983) and Holzsager v. Valley Hospital, 646 F. 2d 792, 797 (2d. Cir., 1981).

The first and third prongs of the Chevron test address equitable considerations and are therefore logically related. The second prong, however, addresses a concern which does not depend on the varying facts of individual cases. The second prong involves the determination of the purpose and effect of the rule in question. In Chevron, the Court found that non-retroactivity was warranted because both the equity test of the first and third prongs and the purpose/ policy test of the second prong were met. Chevron, supra, 404 U.S. at 109.

In DelCostello the Court discussed

and decided once and for all the purpose and policy reasons for applying the Section 10(b) limitation. The Court adopted the observations made by Justice Stewart in Mitchell:

> In Section 10(b) of the NLRA, Congress established a limitations period attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective bargaining system. That is precisely the balance at issue in this case. The employee's interest in setting aside the "final and binding determination" of a grievance through the method established by the collective bargaining agreement unquestionably implicates "those consentual processes that federal labor law is chiefly designed to promote - the formation of the ... agreement and the private settlement of disputes under it." Hoosier, 383 U.S., at 702, 86 S.Ct. at 1111. Accordingly, "the need for uniformity" among procedures followed for similar claims ibid., as well as the clear congressional indication of the proper balance between the interests at stake,

> counsels the adoption of Section 10(b) of the NLRA as the appropriate limitations period for lawsuits such as this." DelCostello, supra, 103 S.Ct. at 2294.

Since the purpose of adopting the Section 10(b) limitation period was to promote uniformity and finality, it would retard (not further) the purpose of the rule to apply it only prospectively. Non-retroactive application would permit the continuance of the chaotic lack of uniformity which existed from state to state and from circuit to circuit. The respondent Union contends that the Court decided as a matter of law in DelCostello that the second prong of the Chevron test could not be met in DelCostello or in any of the other similar cases pending at the time and, therefore, it was logical for the Court to apply the Section 10(b)

limitation period retroactively in the DelCostello case itself.

II. THIS CASE PRESENTS NO IMPORTANT FEDERAL QUESTION WARRANTING REVIEW ON CERTIORARI.

The question presented by the Petitioner is whether the decision made by the Court in DelCostello applies retroactively. As discussed above, the question was answered in the DelCostello case itself. DelCostello provided the uniformity and finality which had been sorely needed. The Petitioner here asks the Court to retreat from the DelCostello decision and make the chaos last a little longer. If the Petitioner prevails and certiorari is granted, the stability of judicial decision will be undermined.

If certiorari is granted to review the question presented here, each side would undoubtedly brief and argue the Chevron test. Ultimately, the Court would have to decide whether the second prong of the Chevron test was satisfied. If the Court were to find that the second prong was satisfied, then the purpose/policy analysis of DelCostello would be meaningless or, at least, severely weakened. If the Court were to hold that the second prong was not satisfied, consistent with the purpose/policy analysis of DelCostello, the Court would be merely wasting its time and resources by needlessly reiterating what was already said in DelCostello.

The Supreme Court frequently decides cases which have great impact without, as

a general rule, specifying whether the decision will be retroactive or prospective only. See, for example, Garcia v. San Antonio Metro Transit Authority, _____, U.S. _____, 105 S.Ct. 1005, (1985). The Court should not now, on this question, begin second-guessing itself. To do so would create the expectation that a retroactive/prospective determination is or should be part and parcel of every major Supreme Court decision. By granting certiorari in this case, the Court would in effect be apologizing for not specifically stating in DelCostello whether the decision was retroactive or prospective only. In every major future case, counsel and courts alike would be uncertain of the Supreme Court's intention when the Supreme Court makes a major

decision without discussing retroactivity. If certiorari is granted here, this case will be perpetually cited, regardless of the ultimate outcome, for the rule that the retroactivity or prospectivity of a decision (DelCostello here) is open to question and further review unless the issue is specifically discussed in the decision itself. The Court should not permit the genesis of such a rule. Rather, the rule should remain, as it has been, that a decision made by the Supreme Court applies retroactively unless the Court, in the decision itself, expressly limits it to prospective application.

III. THE CONFLICT AMONG THE CIRCUITS DOES NOT COMPEL REVIEW ON CERTIORARI.

As noted at the outset, the question of the retroactivity of DelCostello has been presented before and in each instance certiorari has been denied. The Court has already seen this issue in all of the variations which exist among the circuits. The Ninth Circuit's position is that DelCostello applies prospectively unless retroactive application would extend the limitation. Certiorari was denied in the Ninth Circuit cases of Greyhound Lines, Inc. v. Melody Wilhite, supra; Raymond L. Saville, Jr. v. Westinghouse Electric Corp et al., supra; and Edwards v. Teamsters Local No. 36, supra.

The view that DelCostello applies retroactively because the second prong of the Chevron test is not satisfied was represented in Rogers, supra, (11th Cir.) and Murray, supra, (4th Cir.). Certiorari was denied in these cases.

The third view, that no Chevron analysis needs to be done since the Supreme Court has already answered the question by applying the rule retroactively in DelCostello itself, was represented in Welyczko, supra, (2d. Cir.). This view is also represented in this case from the Sixth Circuit. Certiorari was denied in Welyczko, and this case presents the same viewpoint.

At this time, all circuits except the Ninth have held that DelCostello applies retroactively. See, Zemonick v. Consoli-

dation Coal Co., 762 F. 2d 381, 397 (dissent) (4th Cir., 1985) and Smith v. General Motors Corp., 747 F. 2d 372, 374-375 (6th Cir., 1984). While retroactivity is the general rule in the Fourth Circuit, Murray, supra, the Fourth Circuit recently favored prospective application in Zemonick v. Consolidation Coal Co., 762 F. 2d 381 (4th Cir., 1985). In this case, the court, over a strong and well-reasoned dissent, found that the peculiar circumstances of the case justified a limited exception to the general Fourth Circuit rule of retroactivity.

While the Ninth Circuit still takes a position different from that which prevails in the other circuits, the difference does not amount to a serious conflict which will fester and produce a

state of enduring havoc. As stated by the majority in Zemonick, "This problem will shortly go away, if it is not already gone." Zemonick, supra, at 389.

CONCLUSION

The question presented in this case is not new. It has been presented to the Court from all angles and from several different circuits. The question has already been answered by the Court itself by virtue of the retroactive application made by the Court in DelCostello. The question is also answered under the Chevron test, since the second prong of the test cannot be satisfied unless the finality and uniformity goals of federal labor law are abandoned. Except for the Ninth Circuit, the Courts of Appeal are essen-

tially unified. The question presented in this case is now on its deathbed and will soon die on its own. It should not be kept alive by the extraordinary means of certiorari.

Respectfully
submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of this Memorandum were served by first class United States mail, postage prepaid, upon Paul H. Tobias, Attorney for Petitioner, 911 Mercantile Library Building, 414 Walnut Street, Cincinnati, Ohio 45202 and upon Robert E. Kaplan, Attorney for Kaiser Engineers, Inc., Dinsmore & Shohl, 2100 Fountain Square Plaza, 511 Walnut Street, Cincinnati, Ohio 45202 on the ____ day of November, 1985.

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